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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 684

MARY JANE HEISLER,

Appellant,

vs.

BOARD OF REVIEW, BUREAU OF UNEMPLOYMENT COMPENSATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

C. WILLIAM O'NEILL,
Attorney General of Ohio;
JOSEPH S. GILL,
First Assistant Attorney General;
ROBERT E. LEACH,
Chief Counsel;
JOHN W. HARDWICK,
Assistant Attorney General,
Counsel for Appellee.

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IN THE SUPREME COURT OF OHIO

No. 32819

MARY JANE HEISLER,

Appellant,

vs.

BOARD OF REVIEW, BUREAU OF UNEMPLOYMENT COMPENSATION,

Appellee

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee in the above entitled cause, for its statement in opposition to appellant's statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm, respectfully states the following:

I. Statement of Issue on Appeal

Appellant seeks to present in this appeal the question of whether the State of Ohio may constitutionally deny unemployment compensation benefits to her when, contrary to the provisions of the Ohio statutes prescribing eligibility therefor, she refused to accept a referral to a job opportunity when directed to do so by a local employment office of Ohio, and stated as her sole and only ground for such refusal that the employment "necessarily required" her working on Saturdays and that such would be in violation of her religious principles and beliefs as a member of the

Orthodox Jewish faith. Appellant claims that such denial of unemployment compensation benefits prohibits her free exercise of religion and is discriminatory in its treatment of various religious groups, contrary to the First Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment; and that the denial of such benefits fails to accord to her "equal protection of the law" and "equal privileges and immunities" contrary to the Fourteenth Amendment. These claims the appellee denies. Appellee asserts that the absence or presence of a religious belief should not and could not be made a test for allowing or denying unemployment compensation benefits and that the Ohio statutes relative thereto do not prescribe or allow such a test to be applied in making such determination.

II. The Decision of the Supreme Court of Ohio Rests upon a State Ground Which Independently and Adequately Supports the Judgment.

Even if we assume, for the sake of argument, that the First and Fourteenth Amendments to the United States Constitution would preclude a state from denying unemployment compensation benefits to an applicant who has refused to accept an offer of work for which he is reasonably fitted, when such employment would require him to work on Saturdays contrary to his religious beliefs, the record in this case does not present that question.

Prior to 1945, Section 1345-6-d-(2) of the Ohio General Code provided that benefits not be paid where "an individual has refused to accept an offer of work for which he is reasonably fitted." The section contained no reference to an individual refusing to accept a referral to a job opportunity. Under the statute as it then read, an applicant for benefits was not compelled, as a matter of law, to accept a referral to a job opportunity and since an offer

of work for which he was reasonably fitted would necessarily antedate the refusal to investigate a referred job opportunity in such cases, his compensation could not be discontinued solely upon the basis of a refusal to accept and investigate a referral to potential employment. For that reason the 96th General Assembly of Ohio amended Section 1345-6-d-(2) by adding the words "or has refused to accept a referral to a job opportunity when directed to do so by a local employment office of this state or another state" (121 Ohio Laws, page 718).

What we have here is a case where the appellant refused to investigate a referral for possible employment or to make any attempt whatsoever to secure employment from the potential employer to which she was referred. It is significant to note that under Section 1345-6-d-(2) one may refuse to accept an offer of work for which he is not "reasonably fitted," but may not refuse to accept a referral to a job opportunity.

In the case of a refusal to accept a referral to a job opportunity, the disqualification for compensation benefits immediately attaches. The primary reason for this distinction lies in the fact that until the applicant accepts the referral and presents himself to the potential employer, neither the applicant nor the potential employer can possibly know whether the applicant is reasonably fitted for employment in the position under consideration or in some other position within the field of employment of such potential employer.

Since the amendment of the statute in 1945, an applicant for unemployment compensation benefits no longer may refuse to investigate a job opportunity on the ground that if he investigated the same he would not be offered any work, or, if he would be offered work, such would not be work for which he is reasonably fitted. The requirement, of Section 1345-6-d-(2), as amended in 1945, eliminated

much of the guess work as to whether an applicant was honestly attempting to secure suitable employment by requiring such applicant to accept a referral to a job opportunity.

The facts are undisputed that appellant, on November 12, 1948, refused to accept a referral to a job opportunity when directed to do so. The Administrator's initial determination, dated November 4, 1948, so held and this fact has never been disputed by appellant.

The entire evidence in this case relative to this question is contained in a statement of the appellant submitted to a referee of the Bureau of Unemployment Compensation on February 25, 1949, which, so far as pertinent, reads as follows:

> "I, Mary Jane Heisler, the claimant herein, was formerly employed by the Cleveland Wood Artisian Company of 1760 Lakeview Road, Cleveland, Ohio, from December, 1947, to May, 1948, when I was discharged because the company was about to discontinue business. Previously thereto, I had been employed by the Eagle Lion Films Company of Cleveland, Ohio. In neither of these positions did I work on Saturday nor was I required to work on Saturday. On July 13, 1948, I duly filed a claim for unemployment compensation benefits pursuant to Section 1346-4 of General Code.
>
> "I had been employed by an employer subject to Unemployment Compensation Act in at least twenty calendar weeks within my base period and have earned wages in my base period of not less than $160.00.
>
> "I have registered in an employment office maintained by the Unemployment Compensation Administrator in accordance with the rules prescribed by the Administrator.
>
> "On November 12, 1948, I was referred for potential employment to St. Elizabeth's Hospital as a clerk, general office, at 65¢ per hour which was the prevailing wage. I refused to accept the said referral on the sole and only ground that the employment necessarily re-

quired my working on Saturdays. In all other respects, I was able to accept the position and I was reasonably fitted for the said position.

"I am a member of the Orthodox Jewish Faith and adhere strictly to the principles of said faith. The principles of the Orthodox Jewish Faith prohibit the engagement of any work on Saturday which is the Jewish Sabbath. Engagement in work on Saturday would be in violation of my immutable religious principles and beliefs.

"I had been unable to obtain work in my usual trade or occupation or any other employment for which I am reasonably fitted including employments not subject to the Unemployment Compensation Act."

It is clear from the record, therefore, that appellant refused even to investigate the referral. Whether, had she done so, the potential employer would have offered her a job and, if so, whether such job would have required her to work on Saturdays, we, of course, do not know because appellant never gave the potential employer the chance either to offer employment or reject her for employment. In so far as the record discloses, we have here only a case where the appellant refused the referral apparently on the basis that any employment which might be offered would require her to work on Saturdays contrary to her religious beliefs. Until she was, in fact, offered such employment, her conclusion could only be based on pure speculation—the very type of speculation that the 1945 amendment of Section 1345-6-d-(2) sought to eliminate. Appellant's statement as to jurisdiction says that she "was informed by the employment office that the position required working on Saturday." There is nothing in the record to support this statement. The entire record in that regard is contained in the statement of the appellant made to the referee of the Bureau of Unemployment Compensation on February 25, 1949, heretofore quoted.

That the denial of unemployment compensation benefits in this case was based on the refusal of the appellant to accept the job referral is evidenced from the decision of the referee of the Board of Review, under date of March 17, 1949, the pertinent parts of which read as follows:

> "The evidence in the instant case clearly shows that the claimant did, on November 12, 1948, refuse a referral to potential employment at St. Elizabeth's Hospital in Youngstown, Ohio, for work for which she was reasonably qualified, both by training and experience and which paid the prevailing rate for that type of work in the area. Claimant's only reason for said refusal was due to the fact that it would require her to work on Saturdays and since she was a member of the Jewish Orthodox Faith, this interfered with her religious duties, inasmuch as Saturday is considered as the Sabbath and under the terms of her belief, she was forbidden to work on that day.
>
> "Inasmuch as it is mandatory and a condition precedent to eligibility that all applicants accept and investigate all job opportunities and referrals to employment when directed to do so by the local employment office or otherwise forfeit their right to continue receiving benefits, and since the claimant clearly falls within this category, the initial determination of continued claim by the Administrator, dated November 24, 1948, must be sustained. However, even if, in the instant case, claimant had actually accepted and properly investigated said referral and then refused the work offered for the reason given above, she would be ineligible for benefits in accordance with the decision of the Supreme Court of Ohio, in which the following finding was made:
>
> > 'An employe who refuses to work on Saturday, which is the day he observes as his Sabbath, is not available during the entire week for work in his usual trade or occupation as required by G. C.

1345-6 a (4), and is not entitled to unemployment benefits: Kut v. Albers Super Markets, Inc., 146 O. S. App. 51; reversing 29 O. O. 393 (C. P.).)'

522, 32 O. O. 574, 66 N. E. (2d) 643 (affirming 76

"In view of the above holding, this would also be grounds for the affirmance of the Administrator's initial determination of continued claim, dated November 24, 1948."

While the referee's decision contains certain statements as to what the holding would have been had the facts been different—had the appellant "actually accepted and properly investigated said referral and then refused the work offered for the reason given above"—such statements obviously are dicta and can not serve as a basis for appeal to this Court.

On May 23, 1948, in sustaining the decision of the referee, the Board of Review stated only that "it is the decision of the Board that claimant's application to institute a further appeal should be and the same is hereby disallowed."

It is true that the opinion of Judge Ford of the Common Pleas Court of Mahoning County, Ohio, considered the case as though appellant had refused to accept an offer of work for which she was reasonably fitted and upheld the action of the Bureau of Unemployment Compensation solely on the basis of the prior holding of the Supreme Court of Ohio in *Kut* v. *Albers Super Markets, Inc.*, 146 Ohio St., 522, to the effect that an applicant for unemployment compensation must be available for work on Saturday if this is required in his usual trade or occupation, even though such applicant be a member of such Orthodox Jewish faith. Under the law of Ohio, the opinion of a court is not a part of the record and it is a well settled principle that a court speaks only through its journal. Ohio Jurisprudence, Volume 2, Part 1,

page 581. The journal entry of the Court of Common Pleas read as follows:

> "Upon due consideration of the Briefs of Plaintiff-Appellant and Defendant-Appellee which were submitted herein, the Court finds that the decision of the Board of Review was neither unlawful, unreasonable, nor against the manifest weight of the evidence and it is therefore ordered, adjudged and decreed that the same be affirmed. Exceptions saved for Plaintiff-Appellant."

It is also the fundamental rule in Ohio that the affirmance of a judgment by a reviewing court is not an affirmance of the reasons given by the lower court for its ruling, and that a court may affirm a judgment of a lower court even though the judgment of such lower court was put upon a ground which, in the opinion of the appellant court, was not sufficient to warrant it if another ground exists which is sufficient. Ohio Jurisprudence, Volume 2, Part 2, page 1711. The fact, therefore, that the Court of Appeals affirmed the judgment of the Court of Common Pleas of Mahoning County without opinion, and the Supreme Court of Ohio, without opinion, ordered that the appeal be dismissed "for the reason no debatable constitutional question is involved in said cause," can not be considered as an affirmance by either of these courts, and particularly of the Supreme Court of Ohio, of the reasoning contained in the opinion of Judge Ford.

In the briefs of the appellee in both the Court of Appeals and the Supreme Court of Ohio, the fact that the decision of the Bureau of Unemployment Compensation was based on the refusal of the appellant to accept a referral to a job opportunity and not on a refusal to accept an offer of work was stressed. We submit that this was a proper basis for the holdings of the Court of Appeals and the Supreme Court and that it does not in any way involve a federal

question. Even assuming that a federal question was properly raised in the record, which we deny, where both federal and non-federal questions are properly raised in the record but no opinion is delivered by the highest state court in rendering its judgment, or the opinion is ambiguous in this regard, this Court ordinarily presumes that the decision is based upon a non-federal ground raised in the record which is adequate to support it. *Lynch* v. *New York, ex rel. Pierson*, 293 U. S. 52, 54-5; *Adams* v. *Russell*, 229 U. S. 353, 358; *Woods* v. *Nierstheimer*, 328 U. S. 211; *Phyle* v. *Duffy*, 334 U. S. 431; and see *Williams* v. *Kaiser*, 323 U. S. 471, 477.

III. No Substantial Federal Question Presented by the Appeal

For the reasons heretofore stated, we submit that no substantial federal question is presented by this appeal since the undisputed facts show that appellant refused to accept a referral to a job opportunity when directed to do so by a local Ohio employment office, contrary to the provisions of the Ohio statute. Even if this case directly presented the question of whether a member of the Orthodox Jewish faith could refuse to accept an offer of work where such work would require employment on Saturdays, we submit that no substantial federal question would be involved. This question was directly involved in the case of *Kut* v. *Albers Super Markets, Inc.*, 146 Ohio St., 522, wherein the Supreme Court of Ohio held:

> "The statute does not designate particular days of the week. It provides that in order to be entitled to benefits a claimant must be 'able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted.' Hence, he must be available for work on Saturday if this is required by his usual trade or occupation, as in this instance.

> "Is this provision of the statute a violation of the constitutional right to religious freedom or the right to equal protection of the laws? The plaintiff, like everyone else, is free to choose both his religion and his trade or occupation. If in making these voluntary choices he renders himself unavailable for work in his chosen trade or occupation or in any other for which he is reasonably fitted, he, like everyone else who fails to comply with the statutory requirement, is not entitled to unemployment benefits. Hence, the statute is not unconstitutional."

While the Supreme Court of Ohio in the *Kut* case also held that the applicant therein was not entitled to compensation because he had, in effect, voluntarily ceased employment with his previous employer, and while this Court dismissed the appeal of the *Kut* case for the reason that the decision of the state court was based upon a non-federal ground adequate to support it (329 U. S. 669), we submit that no substantial federal question was involved in any event.

This case does not involve any prior restraint on the free exercise of religion as did *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Follett* v. *McCormick*, 321 U. S. 573 and *Marsh* v. *Alabama*, 326 U. S. 501; nor does it involve a legislative enactment compelling action contrary to one's religious belief as did *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

To accept appellant's argument would be to disregard the principle of "a wall of separation between church and State" upheld by the case of *Illinois* v. *Board of Education*, 333 U. S. 203. The argument advanced by the appellant, if followed, would do violence to the principle of complete separation between the church and the state. On applications for unemployment compensation otherwise identical, one would be allowed and another denied solely upon the basis of a religious test. This would compel the Adminis-

trator of the Bureau of Unemployment Compensation to examine into the question of whether the appellant was, in fact, a true believer in the tenets of the Orthodox Jewish faith and whether she did, in fact, believe that it would be against her religion to work on Saturdays. Such action would require a judicial inquiry into a person's faith of a character condemned by this Court in *United States* v. *Ballard*, 322 U. S. 78.

Appellant asserts that if she is not permitted to refuse employment on Saturdays she would be discriminated aaginst. The decision of the Ohio Supreme Court in the *Kut* case shows that this would not be true and that no religious test may be used in determining unemployment compensation benefits.

Only by the employment of inverse logic can the appellant claim discrimination. If benefits are denied to all persons except those holding conscientious scruples and allowed to those holding such conscientious scruples, this can amount to nothing more or less than discrimination in favor of those holding such conscientious scruples and against all others.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the Supreme Court of Ohio be affirmed.

Respectully submitted,

C. WILLIAM O'NEILL,
Attorney General;
JOSEPH S. GILL,
First Assistant Attorney General;
ROBERT E. LEACH,
Chief Counsel;
JOHN W. HARDWICK,
Assistant Attorney General,
Counsel for Appellee.

(1318)

No. 534

APR 2 1962

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

MARY JANE HEISLER,
Plaintiff-Appellant,

against

BOARD OF REVIEW, BUREAU OF UNEMPLOYMENT COMPENSATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

LEO PFEFFER,
American Jewish Congress,
15 East 84th Street,
New York 28, New York,

SOLTZBERG, GOLDBERG AND MILLSTONE,
1007-8 Mahoning Bank Building,
Youngstown 3, Ohio,

Attorneys for Plaintiff-Appellant.

HOWARD M. SQUADRON,
of Counsel.

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IN THE

Supreme Court of the United States

MARY JANE HEISLER,
Plaintiff-Appellant,

against

BOARD OF REVIEW, BUREAU OF UNEMPLOYMENT COMPENSATION.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Facts

A full statements of facts is contained in appellant's Statement as to Jurisdiction heretofore filed in this Court. The following is a brief summary of those facts.

Plaintiff-appellant was refused unemployment compensation benefits by the Administrator of the Ohio Unemployment Compensation Law (Section 1345-6 of the Ohio General Code) for the sole reason that she refused a job referral requiring work on Saturday. Plaintiff is an orthodox adherent to the Jewish faith and she refused the job referral solely because her religious convictions prevented her from working on Saturday. In all other respects she was ready and able to accept the position and was reasonably fitted for it.

Plaintiff appealed from the Administrator's decision, urging the same constitutional objections as she urges here, *viz.:* that under the First and Fourteenth Amendments to the United States Constitution and Section 7 of the Ohio constitution, her rights to religious liberty and due process of law were being infringed; that the refusal of benefits to

Saturday observers constituted an undue preference in favor of observers of other religious faiths in violation of the constitutional principle of separation of church and state; and that she and other Saturday observers were being deprived of equal protection of the law and equal privileges and immunities under the law.

The Board of Review of the Ohio Bureau of Unemployment Compensation affirmed the Administrator's decision, whereupon plaintiff appealed to the Court of Common Pleas of Mahoning County, Ohio. In that Court, Judge Ford, in a clear and concise opinion, dealt explicitly and exclusively with plaintiff's constitutional arguments and rejected them on the authority of a previous Ohio Supreme Court holding. Judge Ford's decision and opinion were affirmed, on appeal, in memoranda decisions by the Mahoning County Court of Appeals and the Supreme Court of Ohio. In both courts, the constitutional questions were thoroughly briefed and comprehensively argued.

The Chief Justice of the Ohio Supreme Court granted this appeal to the Supreme Court of the United States on February 25, 1952. On March 10, 1952, appellee served on appellant a Motion to Dismiss the Appeal or Affirm the decision of the Ohio Supreme Court. This brief is submitted in opposition to that motion.

Statement of Issues

Appellee's Motion to Dismiss or Affirm is based on two contentions: First, that the judgment below rests upon a non-Federal ground adequate to support it, namely, that appellant was not eligible for benefits, under the Ohio statute, because of her failure to "investigate" the job referral, without regard to the fact that her religious beliefs prevented her from taking the job; and, second, that appellant's claims of infringement of constitutional guarantees do not raise a substantial Federal question.

Appellant respectfully submits that these contentions are without merit. The decision below *necessarily* involved the Federal constitutional questions raised here; neither appellant's purported non-Federal ground nor any other non-Federal ground was considered, or even noted, by any of the three Ohio courts which passed upon the case below. Moreover, appellee's purported non-Federal "ground" is, in any event, not adequate to support the judgment below. It is specious, contrived and contrary to Ohio law. Finally, the Federal questions raised by appellant are substantial; their substance is amply proved by the facts of the case, by the Statement as to Jurisdiction heretofore submitted, and by the very arguments of appellee in its Motion to Dismiss or Affirm.

I. The decision of the Ohio Supreme Court involved only the constitutional questions raised by appellant.

A. As noted in our Statement as to Jurisdiction (p. 3), appellant's constitutional objections were properly raised at every stage of the proceedings. Appellee's offhand denial that a Federal question has been properly raised (Motion to Dismiss, p. 11) is not supported by the record and is entirely without merit.

There is also no question that this Court is not deprived of jurisdiction by the fact that the courts below passed on the constitutional questions under the Ohio as well as the United States Constitutions. In passing solely, as we show below, on the constitutional questions, the Ohio courts necessarily interpreted both constitutions. They could not decide the case against appellant without reaching the Federal constitutional question since both constitutional arguments had to be decided against her before her claim could be rejected.

B. We submit that it is plain on this record that the constitutional issue was the only one considered by the Ohio Supreme Court. In the Court of Common Pleas, the first court to consider the case, Judge Ford dealt directly and

exclusively with appellant's constitutional contentions, rejecting them on the authority of *Kut* v. *Albers Super Markets, Inc.*, 146 O. S. 522. (Statement as to Jurisdiction, Appendix A.) In the *Kut* case, the Ohio Supreme Court had upheld a denial of unemployment compensation benefits to an orthodox Jew. As Judge Ford pointed out, there were two grounds for that decision, one of them admittedly irrelevant to the instant case (plaintiff in that case had also refused a job not involving Saturday work); the other ground, however, was clearly relevant and was, Judge Ford felt, binding upon him:

> "It is true, as pointed out on Page 14 of Appellant's brief, that there are two grounds of the Court's decision in the Kut case; that the constitutional ground was concurred in by five out of seven judges, and that it was not reviewed by the United States Supreme Court. Nevertheless, the Court's decision was specifically based upon both grounds and one of these grounds involves the very question urged by appellant in this case and is adverse to appellant's contentions.
>
> "I do not believe that a trial judge should under such circumstances, reach a conclusion adverse to that of his final State court of review, unless under very extraordinary circumstances. There are no such circumstances here as I see it. This case is probably headed for review, however it be decided here, and it would serve no useful purpose to include in this opinion a discussion of the constitutional questions raised by appellant. Feeling bound, as I do, by the decision in the Kut case, I find that the decision of the Board of Review was neither unlawful nor unreasonable, nor against the manifest weight of the evidence, and it is therefore affirmed" (Statement as to Jurisdiction, Appendix A, pp. 3-4).

It is clear then that Judge Ford's decision rests (as appellee concedes in its Motion to Dismiss, p. 9) "solely on the basis of the prior holding of the Supreme Court of Ohio in *Kut* v. *Albers Super Markets, Inc.*, 146 Ohio St. 522", that an applicant for unemployment compensation

benefits is deprived of no constitutional rights by being *required* to be available for work on Saturday even though he is a member of the orthodox Jewish faith.

Judge Ford's decision was affirmed by the Mahoning County Court of Appeals which found that "the judgment of the Court of Common Pleas of Mahoning County, Ohio, is in accord with the Law of Ohio and that the appeal of the Plaintiff-Appellant is not well taken and the same should be dismissed" (Statement as to Jurisdiction, Appendix B).

The Supreme Court of Ohio, upon appeal, again sustained the decision by Judge Ford *"for the reason no debatable constitutional question is involved in said cause"* (156 O. S. 395; Statement as to Jurisdiction, Appendix C). (Emphasis added.)

Thus, the Ohio Supreme Court did not, as appellee suggests, find that there was no constitutional issue in the case at bar. It found only that there was no *debatable* constitutional issue under its interpretation of the Ohio and Federal Constitutions. That finding is clearly a finding on a Federal question. Moreover, it was the only finding made by the Ohio Supreme Court. That court did not, as it did in the *Kut* case, introduce a non-Federal ground into its decision. The refusal of this Court to take jurisdiction in that case "for the reason that the decision of the State Court sought here to be reviewed is based upon a non-Federal ground adequate to support it" (329 U. S. 669) is therefore entirely inapposite in the instant case.

The Ohio Supreme Court decision in the case at bar would thus seem clear; it represents a rejection of appellant's constitutional arguments. Yet appellee insists—despite this plain meaning—that it should be *regarded* as meaning more because no opinion was rendered and a non-Federal question was raised in the record (Motion to Dismiss, p. 11). With regard to the record, appellee refers to the decision by the Referee of the Bureau of Unemployment Compensation which rested *both* on the *Kut* case and on the appellant's "failure to investigate" the job referral

(Motion to Dismiss, p. 8). Appellee argues that the Referee's opinion—which discusses both issues—should be *regarded* as enveloped in the Supreme Court decision, because, under Ohio law, Judge Ford's opinion (rejecting the non-Federal ground relied upon by the Referee) "is not a part of the record" (Motion to Dismiss, p. 9); and because the affirmance of Judge Ford's judgment by the Supreme Court of Ohio is not necessarily an "affirmance of the reasoning contained in the opinion of Judge Ford" (Motion to Dismiss, p. 10).

It is obvious that appellee's conclusion does not follow from appellee's premises. There is no reason to assume that the Ohio Supreme Court *did* embrace the reasoning of the Referee because it *could* have rejected Judge Ford's reasoning. The implication of the authority cited by appellee is plainly to the contrary, *i.e.*, that the reviewing court *will* explain its reasons for affirming a lower court decision when it disagrees with the reasoning of that lower court (Ohio Jurisprudence, Vol. II, Part 2, p. 1711). Moreover, appellee's suggestions that this Court disregard the lower court opinions, which clearly provide the best evidence of the grounds for the State court decisions, is obviously absurd. *Cf. Lynch* v. *New York ex rel. Pierson*, *infra*, p. 7, 293 U. S. 52. In any event, the important fact is that the phraseology of the Supreme Court decision in the case at bar *proves* concurrence with Judge Ford's reasoning and demonstrates complete rejection by the Supreme Court of the non-Federal ground urged by appellee.

Nonetheless appellee argues that it continued to raise the rejected non-Federal ground in its brief, and

> "* * * where both Federal and non-Federal questions are properly raised in the record, but no opinion is delivered by the highest State Court in rendering its judgment * * * this Court ordinarily presumes that the decision is based upon a non-Federal ground raised in

the record which is adequate to support it. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54-5; *Adams* v. *Russell*, 229 U. S. 353, 358; *Woods* v. *Nierstheimer*, 328 U. S. 211; *Phyle* v. *Duffy*, 334 U. S. 431; and see *Williams* v. *Kaiser*, 323 U. S. 471, 477" (Motion to Dismiss, p. 11).

In effect the appellee is here arguing that consideration of Federal rights by this Court can be precluded by a combination of lower court briefs which raise issues not being considered by the lower courts and an absence of opinion by the highest State court. However, in each of the cases cited by appellee, there is considerably more than mere discussion in the briefs to support the supposition that the non-Federal ground may have served as the basis for the decision of the highest State court. Thus, in *Adams* v. *Russell*, the highest State court had previously decided the same issue on an explicit non-Federal ground; in *Phyle* v. *Duffy*, the State Supreme Court referred to the non-Federal ground in its decision; in the other cases, the lower *court* opinions referred to the non-Federal ground (*Woods* v. *Nierstheimer; Lynch* v. *People of New York ex rel. Pierson*). In none of these cases was there a clear rejection of the non-Federal ground by any one of the State courts which considered the case. If there had been such a rejection, as there was by Judge Ford in the case at bar, this Court would not have regarded the problem of jurisdiction as ambiguous. Cf. *Lynch* v. *People of New York ex rel. Pierson, supra*, where this Court, in refusing jurisdiction, emphasized the fact that the New York Appellate Division had not stated (in a case in which the New York Court of Appeals rendered no opinion) that its decision was based on constitutional issues alone. It must appear, as this Court declared in *Williams* v. *Kaiser*, 323 U. S. 471, 477, that "the decision of the state court may have been either on a state ground or a Federal ground" before jurisdiction will be denied. Where, as in the case at bar, it has been made plain that the decision rests only on a Federal ground, the mere mention of a non-Federal ground in appellee's

briefs cannot preclude consideration of the constitutional issue. This follows, *a fortiori*, from the well settled rule that this Court will not permit the mere introduction, even in a State court opinion, of a purported non-Federal ground to serve as a pretext for the evasion of a decision on Federal rights. See *Angel* v. *Bullington*, 330 U. S. 183, 188; *Brown* v. *Western Railway*, 338 U. S. 294, 299.

C. It is particularly clear in the case at bar that the non-Federal "ground" urged by appellee was not and could not have been relied upon by the Supreme Court of Ohio, since the purported non-Federal ground *is not adequate, in any event*, to serve as independent support for the decision of that court. It is a specious ground directly contrary to the governing Ohio law.

Appellee makes an elaborate argument, based on a 1945 amendment to the Ohio Unemployment Compensation Law (Motion to Dismiss, pp. 3-5) and concludes that all persons must "investigate" job referrals before they may claim unemployment compensation benefits under the Ohio Unemployment Compensation Law. It is not clear what "investigation" means. We may assume in the instant case that neither appellant's knowledge nor her refusal to work at the particular job would have been affected by any further "investigation"; while there may be disagreement as to how she learned that the job required Saturday work (Motion to Dismiss, p. 7), there has never been any question that it did require such work, that she knew that it required such work and that she would not perform it because of her religious convictions. In such circumstances neither the 1945 amendment nor any other part of the Ohio Unemployment Compensation Law required more of appellant than what she did; the Ohio law does not require performance of futile acts of "investigation".

This point was stated clearly in 1948 by the Ohio Unemployment Compensation Board of Review in *Case 12915 Ohio R. reported in Comp. Interp. Serv. Ben. Serv., Vol. XI, No. 11, p. 96.* In that case, the claimant was referred by

a local employment office to a job as a laundry worker for $.35 an hour. She had previously been employed as a lathe operator at the rate of $.75 an hour. The claimant refused to accept and investigate the job referral on the ground that the salary offered was completely unsatisfactory as she was the head of a family of four and their sole support. The Administrator held that Section 1345-6-d-2 required a claimant to investigate and accept every job referral and that her refusal to do so disqualified her from receiving any benefits. The Board of Review reversed this decision, refusing to give so narrow an interpretation to the compensation statute. It held (Id. at 97):

> "Although as a general rule, a claimant for unemployment benefits is required to accept and investigate referrals to job opportunities when directed to do so by a local employment office, *nevertheless when from the very nature of the referral it appears that claimant is not reasonably fitted to perform the work involved therein, and would be amply justified in refusing the work if it were offered, refusal to accept and investigate such a referral does not ipso facto disqualify the claimant from receiving benefits.*" (Emphasis added.)

Case 12618 Ohio R. Unemp. Comp. Interp. Serv. Ben. Serv., Vol. XI, No. 7 (1948), p. 122, is in accord. There the claimant, a resident of Luckney, Ohio, had been referred by the local employment office to a job in Bowling Green, Ohio. The claimant refused to accept or investigate this job referral on the ground that there was no transportation available to her from her home to Bowling Green. The Board held that the claimant would have been justified in refusing to accept this job and therefore was justified in refusing to investigate the referral. The Board first succinctly defined the problem as follows:

> "• • • is an investigation required of every referral made by the local employment office regardless of circumstances involved" (Id. at 123).

It then answered this question in the negative, holding:

> "In view of these facts and circumstances * * * we find claimant was justified in not investigating the referral to a job opportunity in Bowling Green, Ohio, and the suspension of her benefit rights as of January 10, 1946, should be removed" (Id. at 124).

A similar situation was presented to the Board in *Case 12619 Ohio R. Unemp. Comp. Inter. Serv. Ben. Serv., Vol. XI, No. 7 (1948), p. 124.* In this case the United States employment office referred the claimant to a job which would require him to travel three hours daily to and from work. The claimant refused to accept or investigate the referral. Nevertheless, the Board permitted him to recover his compensation benefits. It held (Id. 125, 126):

> "In view of the language of subdivision d(2) it appears that each individual claiming unemployment compensation benefits is required to accept and investigate each referral to a job opportunity when directed to do so by a local employment office. However, what effect, if any, do the provisions of subdivision e have upon this general requirement? * * *
>
> "We are * * * (therefore) of the opinion that subdivision d(2) must be construed and applied in the light of the provisions of subsection e, and when it appears that an individual would be justified in refusing new work by virtue of the provisions of subsection e, such individual would not be required to accept and investigate a referral to such work. *To hold otherwise would require the doing of a vain and useless act and no useful purpose could be served.*" (Emphasis added.)

Similarly, in Case 10567 Ohio R. Comp. Inter. Serv. Ben. Serv., Vol. IX, No. 6 (1946), the Board of Review held that where the claimant would have been justified in refusing the job if offered, because of his superior training, experience and need for high salary, *he was justified in refusing the "referral".*

These decisions of the Ohio Unemployment Administration and the Board of Review are in complete accord with the authority throughout the country. *See Case #13488 S. C. R. Unemp. Comp. Int. Serv., Vol. 12, No. 6; Case 9102 S. Dak. R. Unemp. Comp. Int. Serv. Ben. Serv., Vol. 8, No. 1; Case 13265 Wisc. A. Unemp. Comp. Int. Serv. Ben Serv., Vol. 12, No. 3.*

In brief, the Ohio Law does not require the doing of "vain and useless" acts (Case 12619, Ohio R., supra). Appellant could not have been refused benefits because she declined to "investigate" a job that conflicted with her religious convictions; she was refused benefits because she would not work on Saturday. Appellee's "non-federal ground" is no ground at all under the Ohio Law. Since it is certainly neither "a substantial or sufficient one, 'it will be presumed that the State Court based its judgment on the Law raising the Federal question, and this Court will then take jurisdiction' ". *Williams* v. *Kaiser,* 323 U. S. 471, 478. The facts of this case compel application of the square holding in *Williams* v. *Kaiser,* and rejection of appellee's argument that the decision below rests on an adequate independent state ground.

II. The Federal questions are substantial.

Appellant's Statement as to Jurisdiction demonstrates that the Federal questions involved in this case are substantial and of great importance. They involve fundamental constitutional rights—the rights to religious liberty and to equal treatment under the law. The refusal by the State of Ohio to grant unemployment compensation benefits to a person whose religious convictions prevent her working on Saturday amounts to a penalty on the exercise of religion. In this case, this Court has the opportunity for the first time to pass on the propriety of that penalty.

Appellee's Motion to Dismiss or Affirm offers virtually no arguments in support of its assertion that these fundamental questions of religious liberty and equal protection

are not substantial. It relies first on a quotation from the *Kut* case which, as we noted in our Statement as to Jurisdiction (p. 12), was decided before the most recent decisions of this Court on religious freedom and separation of church and state. Moreover, the argument quoted is manifestly unsound. It states, in effect, that appellant is still free to get unemployment compensation benefits by "choosing" not to be a Sabbath-observing Jew. Such a "choice" is not in any sense free. Certainly, there is no religious freedom when the penalty of exercising it is the loss of state benefits which, as we have shown (Statement as to Jurisdiction, p. 9), can be extended to all without administrative difficulty.

Appellee's other arguments emphasize rather than detract from the importance and substance of the Federal constitutional questions here raised. The contentions that appellant's position violates the principle of separation of church and state or that it requires improper "discrimination" in favor of those holding "conscientious scruples" are perhaps novel, but entirely without merit. To the extent that they raise new questions concerning the scope of the separation principle and the constitutional requirements of equality, they require consideration, not dismissal, by this Court.

CONCLUSION

The Federal questions raised by appellant are substantial and of great importance to Sabbatarians and to the administration of unemployment compensation laws throughout the country. It is vital that they be resolved by this Court finally and at an early date. It is therefore respectfully requested that appellee's Motion to Dismiss or Affirm be denied and that this Court note probable jurisdiction to decide this appeal.

Respectfully submitted,

LEO PFEFFER,
American Jewish Congress,
15 East 84th Street,
New York 28, New York,

SCHERMER, GOLDSTEIN AND MILLSTONE,
1007-8 Mahoning Bank Building,
Youngstown 3, Ohio,

Attorneys for Plaintiff-Appellant.

HOWARD M. SQUADRON,
of Counsel.